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Court of Appeals
Division II
State of Washington
1/4/2018 3:24 PM

No. 51197-5-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL NATIONAL ASSOCIATION,

Respondent,

v.

PACIFIC COAST CONSTRUCTION, L.L.C., a Washington limited liability company; DAVID M. FERDERER; GARY M. CLINE and REBECCA J. CLINE, individually and the marital community comprised thereof,

Appellants.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT
WASHINGTON FEDERAL NATIONAL ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LAWS

RULES AND OTHER AUTHORITIES

I. INTRODUCTION

Washington Federal National Association brought this action to judicially foreclose a deed of trust securing a commercial loan granted by Appellants David Ferderer and Gary and Rebecca Cline. The sole issue on appeal is whether the action was timely brought within the six-year statute of limitations. The trial court concluded on summary judgment that it was, and entered a decree of foreclosure in favor of Washington Federal.

This Court should affirm for two reasons. *First*, Ferderer and the Clines filed for bankruptcy protection, preventing Washington Federal from bringing an action to foreclose. The statute of limitations was tolled during the pendency of the bankruptcy proceedings. *Second*, Washington Federal received payments during the bankruptcy on the underlying debt. The statue of limitations was restarted by these payments.

II. COUNTERSTATEMENT OF THE ISSUES

The statute of limitations to judicially foreclose a deed of trust is six years. The action accrued on May 9, 2009, when the note matured. Washington Federal filed suit on October 26, 2016, more than six years later. Was Washington Federal's action timely because the limitations period was (1) tolled for nearly three years by Ferderer's and the Clines's bankruptcy proceedings, and/or (2) restarted when the bankruptcy trustee made payments to Washington Federal on the underlying debt? **Yes.**

III. COUNTERSTATEMENT OF THE FACTS

In 2008, Horizon Bank made a commercial loan to Pacific Coast Construction, LLC, a real estate development company. CP 97-98 (¶ 3); CP 102-107 (loan). The loan was evidenced by a promissory note and secured by a deed of trust that encumbered, among other parcels, the rental property subject to foreclosure in this case. CP 98-99 (¶¶ 4, 7); CP 109-112 (note); CP 114-128 (deed of trust). The deed of trust was granted by Federer and the Clines, who were Pacific Coast's managing principals. CP 111, 114. The deed of trust has priority over any other interest in the property. CP 99 (¶ 8); CP 130-143 (litigation guaranty). Washington Federal acquired all rights to the loan, note and deed of trust from the FDIC in 2010. CP 99 (¶ 9); CP 145-146 (assignment).

Pacific Coast defaulted on the note, which matured on May 9, 2009. CP 98-99 (¶ 5, 11). On July 28, 2011, before Washington Federal commenced any foreclosure action on the deed of trust, Ferderer and the Clines each filed voluntary petitions for Chapter 7 bankruptcy. CP 60-63; CP 80-83. Washington Federal filed claims in both cases. CP 100 (¶ 15). On April 2, 2013, Washington Federal received a distribution from the Cline bankruptcy, and on May 1, 2014, it received a distribution from the Ferderer bankruptcy—both of which were applied to the debt. *Id.*; CP 72,

92. The Clines' bankruptcy case was closed on April 3, 2013, and Ferderer's was closed on May 22, 2014. CP 58 (¶¶ 4, 7).

On October 26, 2016, Washington Federal filed this action to foreclose on the deed of trust. CP 1-37. Although the debt far exceeds the value of the property, Pacific Coast has been insolvent and defunct for many years and Washington Federal waived its right to collect a deficiency against it under RCW 6.23.020 and RCW 61.12.070. CP 4-5 (¶ 5.1). And, because Ferderer and the Clines had each obtained a discharge in bankruptcy, Washington Federal asserted no claims against them personally in this action. *Id.* Washington Federal seeks to recover only from the property by judicial foreclosure.

Appellants moved to dismiss on statute of limitations grounds, which was denied when Washington Federal raised various tolling defenses. CP 47; Dkt. Nos. 14 & 17. Washington Federal then moved for summary judgment and a decree of foreclosure, demonstrating that the limitations period was tolled by Ferderer's and the Clines's bankruptcies or, alternatively, restarted by payments made on the debt. CP 43-51. Washington Federal reserved its right to raise other equitable tolling arguments at trial—based on Ferderer's and the Clines's failure to properly schedule the property and disclose the liens against it during the bankruptcy proceedings—if its motion was unsuccessful. *See* CP 44 n.1.

The trial court granted Washington Federal's motion, and entered a decree of foreclosure. CP 378-81. In an oral ruling, the court concluded that the bankruptcy trustee's payments on the debt extended the statute of limitations, VRP at 35:23-36:19, and did not expressly reach Washington Federal's bankruptcy tolling argument. The court ordered the property to be sold and the proceeds applied to the $1,254,630.24 still owing on the debt. *Id.* Appellants' motion for reconsideration was denied. CP 403-405.

IV. ARGUMENT

The trial court properly granted Washington Federal's motion for summary judgment. This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

A. The Statute Of Limitations Was Tolled During The Pendency Of Appellants' Bankruptcy Proceedings.

Washington Federal's action was timely because the statute of limitations was tolled for almost three years during the pendency of Ferderer's and the Clines's bankruptcy proceedings. This was Washington

Federal's primary argument below and, although the trial court did not expressly reach it in her oral ruling, this Court can and should affirm on this basis alone. *See Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 200, 289 P.3d 690 (2012) ("[w]e may affirm summary judgment on any theory established and supported by the moving party, even if it is not the basis relied upon by the trial court"); RAP 9.12.

The statute of limitations to foreclose a deed of trust is six years. RCW 4.16.040; *see also 4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434, 382 P.3d 1 (2016). Washington Federal's action began to accrue on May 9, 2009, when Appellants failed to pay the amounts owing on the note at maturity. CP 98-99 (¶ 5, 11).[1] Ordinarily, then, the statute of limitations would have expired in May 2015—17 months before Washington Federal filed suit in October 2016. But both Ferderer and the Clines filed for bankruptcy in July 2011. CP 60-63; CP

[1] Appellants appear to concede this accrual date, *see* Op. Br. at 13, but suggest that the action may have accrued in November 2008 based on a September 2009 Horizon Bank email stating that the "loan is 10 months past due." CP 175. Even if this email were evidence of a default, default is not enough to start the limitations period prior to maturity. For that to happen, a lender must elect to accelerate the debt "in a clear and unequivocal manner which effectively apprises the maker that the holder has exercised his right to accelerate the payment date." *4518 S. 256th, LLC*, 195 Wn. App. at 435. Here, there is no evidence that Horizon Bank accelerated the debt. Regardless, even if the debt accrued in November 2008 rather than May 2009, the action is still timely because an additional 10 months does not escape the tolling of Ferderer's 34-month bankruptcy.

80-83. And both bankruptcy cases lasted more than 17 months: 34 months for Ferderer; 21 months for the Clines. CP 58 (¶¶ 4, 7). Thus, Washington Federal's foreclosure action was timely if the limitations period was tolled during the duration of the bankruptcy cases.

There can be no dispute that it was. Washington courts have long recognized the tolling rule that if "a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right even though the statute makes no specific exception in his favor in such cases." *Seamans v. Walgren*, 82 Wn.2d 771, 775, 514 P.2d 166 (1973). This policy is expressly codified by statute: "When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action." RCW 4.16.230.

When Ferderer and the Clines filed for bankruptcy, it triggered the Bankruptcy Code's automatic stay provision. 11 U.S.C. § 362(a). This prevented Washington Federal from taking action against the property until both bankruptcies were closed, including any effort to foreclose on the deed of trust. *Id.*, § 362(a)(3) (stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"). Thus, Ferderer's and the Clines's bankruptcy cases plainly operated as an "injunction" and a federal "statutory prohibition" to stay accrual of the action within the meaning of RCW 4.16.230. *See Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354-55 (5th Cir. 2008) ("When a bankruptcy petition is filed, an automatic stay operates as a self-executing injunction.").

Appellants argued below that *McDermott v. Tolt Land Co.*, 101 Wash. 114, 172 Pac. 207 (1918), prevents application of RCW 4.16.230. In *McDermott*, our Supreme Court held that bankruptcy did not prevent foreclosure and, thus, did not toll the limitations period on a foreclosure action. Critically, however, when *McDermott* was decided in 1918, filing a petition in bankruptcy <u>did not</u> result in an automatic stay. *Id.* at 119 ("these appellants might have brought their action to foreclose … notwithstanding the bankruptcy proceeding."). That changed in 1978, with the enactment of the Bankruptcy Code and its automatic stay provision. *See* Pub. L. No. 95-598, 92 Stat. 2549; *In re Calstar, Inc.*, 159 B.R. 247, 257 & n.28 (Bankr. D.Minn. 1993).[2] Simply put, *McDermott* has been superseded by the subsequent changes to federal bankruptcy law.

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[2] Prior to enactment of 11 U.S.C. § 362, the 1938 amendments to the Bankruptcy Act and the Bankruptcy Rules did allow a stay under certain circumstances. *Calstar*, 159 B.R. at 257 & n.28. But even the limited stay available under old bankruptcy law post-dates *McDermott*.

The Bankruptcy Code confirms that the automatic stay, coupled with RCW 4.16.230, tolls the statute of limitations for the entire duration of the stay. The Code provides in relevant part:

> … if applicable non-bankruptcy law … fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor … and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c). The reference to a "claim against the debtor" includes claims against the property of the debtor. *In re Hunters Run Ltd. P'ship*, 875 F.2d 1425, 1427 (9th Cir. 1989) (citing 11 U.S.C. § 102). "In some jurisdictions state law may dictate suspension of a statute of limitations when a bankruptcy … has stayed the initiation of such action. Such suspensions would presumably be included within the terms of 108(c), adding the entire duration of the automatic stay to the applicable time period." 1 Collier on Bankruptcy § 108.04, p. 108-14 (15th ed. 1993).

By its plain terms, RCW 4.16.230 is "applicable non-bankruptcy law" that suspends the statute of limitations. In states with tolling statutes identical to RCW 4.16.230, courts universally hold that the accrual period is tolled by the Bankruptcy Code's automatic stay. *Timm v. Dewsnup*, 86 P.3d 699, 702 (Utah 2003) ("operation of these complementary statutes means that while the Dewsnups were in bankruptcy proceedings the lenders were barred from foreclosing on the trust deed property, and the statute of limitations on their foreclosure action was stayed."); *see also Osborne v. Buckman*, 993 P.2d 409, 412 (Alaska 1999); *Turner and Boisseau Chartered v. Lowrance*, 852 P.2d 517, 518-20 (Kan. App. 1993); *Norwest Bank Iowa, N.A. v. Corey*, 2000 WL 526681, *3 (Iowa App. Apr. 28, 2000). Indeed, in *Hunters Run*, the Ninth Circuit recognized that it was likely that RCW 4.16.230 tolled the limitations period "in spite of old Washington law based on the old bankruptcy law." 875 F.2d at 1429 n.5.[3]

Finally, Washington Federal's foreclosure action was tolled by RCW 4.16.230 even though Washington Federal could have sued Pacific Coast on the note within the six-year limitations period (Pacific Coast did not file for bankruptcy). "The beneficiary of a trust deed elects from three

[3] Although no Washington court has specifically considered the issue, like the Ninth Circuit, cases suggest that the stay tolls the limitations period. *See Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 297, 724 P.2d 434 (1986) ("if the action could have been commenced against Nelsen's Tire by effecting service of process within 90 days of filing, as provided by RCW 4.16.170, the stay resulting from a bankruptcy proceeding occurring within that period would indeed have tolled the running of the statute of limitations"). *See also Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 684-85, 10 P.3d 371 (2000) (approving *Kiehn*).

remedies upon a borrower's default, (1) where the trust deed secures a note, sue on the note; (2) foreclose under existing mortgage foreclosure proceedings; or (3) foreclose pursuant to [the Deeds of Trust Act]." *Umpqua Bank v. Shasta Apartments, LLC*, 194 Wn. App. 685, 697, 378 P.3d 585 (2016) (quotation marks and citations omitted). These remedies are distinct, and it is well-settled that the limitations period runs separately as to each. *See Hinchman v. Anderson*, 32 Wash. 198, 207, 72 Pac. 1018 (1903); *Hanna v. Kasson*, 26 Wash. 568, 573, 67 Pac. 271 (1901).

Thus, the fact that the limitations period to sue on a debt has expired does not effect the separate—and tolled—limitations period to foreclose. In *Osbourne v. Buckman*, the Alaska Supreme Court considered this precise issue, and held that bankruptcy tolled the statute of limitations on an action to foreclose (pursuant to a statute identical to RCW 4.16.230) even though the lender was not prevented from suing on the note.

> Alaska Statute 09.10.170 provides that "[w]hen the commencement of an action is stayed" the time of the stay is suspended when calculating the limitations period. We construe the statutory phrase "an action" to encompass all of the Osbornes' claims arising from the note and deed of trust, including their right to judicially foreclose and seek a deficiency judgment. That the Osborne's might have permissibly "split" their cause of action and sought a personal judgment against Buckman does not mean they had to do so. Their foreclosure action as a whole was stayed and they are entitled to the period of suspension required by section .170.

Osbourne, 993 P.2d at 412. Washington law is the same, and so should be the result. For this reason too, there can be no dispute that RCW 4.16.230 tolled the limitations period on Washington Federal's foreclosure action during the pendency of Ferderer's and the Clines's bankruptcies.

B. The Statute Of Limitations Was Restarted When The Bankruptcy Trustee Made A Payment On The Debt.

The trial court concluded that Washington Federal's action was timely because Washington Federal's receipt of payments on the debt restarted the statute of limitations. Although the Court does not need to reach this issue, it also can affirm on this basis. RCW 4.16.270 provides:

> When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a … promissory note … or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

It is undisputed that Washington Federal received payment on the debt from the Clines and Ferderer bankruptcies in April 2013 and May 2014, respectively. CP 72, 92; CP 100 (¶ 15). Giving RCW 4.16.270's language its plain meaning, as this Court must, these payments restarted the six-year limitations period. Because Washington Federal filed this action within six years after the last payment was made, the action is timely.

Appellants argue that RCW 4.16.270 applies only where there are "voluntary payments by the debtor." Op. Br. at 2-3, 12, 17-18. The Court should reject this interpretation, which is contrary to the statute's plain meaning. Appellants' argument is premised entirely on Washington cases applying the *common law* partial payment rule. *See Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947); *Abrahamson v. Paysse*, 159 Wash. 516, 293 Pac. 985 (1930); *Berteloot v. Remillard*, 130 Wash. 587, 228 Pac. 690 (1924); *J. M. Arthur & Co. v. Burke*, 83 Wash. 690, 145 Pac. 974 (1915)). None of these cases cite RCW 4.16.270 or its predecessors. And, to be sure, no Washington case holds that RCW 4.16.270 is inapplicable where, as here, payment on the debt is made by a bankruptcy trustee.

A bankruptcy distribution is a "payment" under the statute. *U.S. v. Quinones*, 36 B.R. 77 (D.P.R. 1983), is instructive. There, the court held that a bankruptcy distribution restarted the limitations period against a co-debtor under a similar federal tolling statute. *See* 28 U.S.C. § 2415(a) ("in the event of partial payment … the right of action shall be deemed to accrue again at the time of each such payment"). The court reasoned:

> Defendants cannot benefit from the fact that their liability … has been reduced, and at the same time contend that the final distribution payment is not a later partial payment under Section 2415. Defendants have in fact acknowledged the existence of their debt and have impliedly promised to pay the balance by accepting the reduction in their liability.

36 B.R. at 79. The same is true here. The bankruptcy distributions reduced Pacific Coast's debt, and should be treated as tantamount to an implied

promise to pay the remainder. For these reasons, Washington Federal's action was timely under RCW 4.16.270 as well.[4]

C. In The Event This Court Reverses, Appellants Are Not Entitled To Dismissal Or An Award Of Attorneys' Fees.

Appellants ask this Court to not only reverse summary judgment, but to remand "with instructions to dismiss." Op. Br. at 4, 9, & 22. Even in the unlikely event this Court reverses, it cannot order the dismissal of Washington Federal's action on statute of limitations grounds because Washington Federal has equitable tolling defenses that have not been adjudicated. In its answer to Appellants' unsuccessful motion to dismiss, and in its motion for summary judgment and reply, Washington Federal specifically reserved its right to raise these fact-based defenses. CP 44 & n.1; CP 356-57 & n.6. Appellants did not address these defenses or cross-move for summary judgment. If this Court reverses, Washington Federal is entitled to a trial on its equitable tolling defenses.

For the same reason, this Court cannot grant Appellants' request for an award of attorneys' fees. Even if the relevant loan documents entitle the "prevailing party" to such an award (something Washington Federal

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[4] Washington Federal argued below that, apart from the bankruptcy distribution, a payment it received from a title insurance company in 2016 restarted the statute of limitations under RCW 4.16.270. CP 47; CP 100 (¶ 16). Given the obvious bases for tolling demonstrated above, there is no need for the Court to consider this alternative grounds for affirmance.

did not request below), and even if this Court reverses, Appellants cannot be considered the prevailing party until and unless they win on the merits at trial and obtain a final dismissal of Washington Federal's foreclosure action. *Walker v. Quality Loan Services Corp.*, 176 Wn. App. 294, 323, 308 P.3d 716 (2013); *Ryan v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 476, 287 P.3d 629 (2012). Then, and only then, can Appellants ask the trial court to award attorneys' fees, including their fees on appeal.

V. CONCLUSION

The trial court properly concluded that Washington Federal's foreclosure action was timely. The judgment below should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of January, 2018.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria, hereby certify under penalty of perjury of the laws of the State of Washington that on January 4, 2018, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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January 04, 2018 - 3:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Superior Court Case Number:	16-2-12310-0

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